Presentation of The Walt Disney Company and The ABC Television Network
May 16, 2003

Reimposition of the repealed financial interest and syndication rules is entirely unwarranted.

<u>There is no legal basis for re-imposing the financial interest and syndication rules.</u>

- In 1970, the FCC adopted the former fin syn rules.[1] The FCC based its decision on the competitive landscape at that time, when: (1) the entire television industry consisted of only three networks; (2) the three networks commanded more than 90% of all TV viewing; and (3) there were only 621 television stations, 499 of which were network affiliates. Commissioner Cox justified his vote in part by concluding that – at that time -- "the cable industry is almost totally unwilling to try to move ahead on the basis of generating, paying for, and selling new program services to the American people."
- By the early 1990's competition from new broadcast and cable networks eliminated the factual predicate and the legal justification for these restrictions.
- In 1991, the Commission engaged in an ill-fated attempt to revise the fin syn rules, adopting a requirement that no more than 40 percent of a network's prime-time entertainment schedule could consist of programs produced by the network.[2] The now-repealed 40 percent requirement is quite similar to that now proposed by some advocates.
- A year later, the Seventh Circuit, in <u>Schurz Communications v. FCC</u>, soundly vacated the 40 percent requirement, as well as all the other the remaining fin syn rules.[3] The court stated that the basis for the rules "was never very clear" and expressed deep concern as to whether the fin syn rules <u>ever</u> made any sense because of the perverse results of the rules that television production business became "riskier" and "more concentrated."[4] The court stated directly that the FCC could not ignore the decline in market share and market power of the three original networks.[5]
- In 1993, a court dissolved the consent decrees that were entered against the networks in earlier litigation.[6] That court strongly dismissed allegations of network monopoly or monopsony power, citing the "paucity of evidence" to support such claims.[7] The court concluded that, "[w]hen all is said and done

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[1] Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 FCC 2d 382 (1970).
[2] Evaluation of the Syndication and Financial Interest Rules, Report and Order, 6 FCC Rcd 3094 (1991); Evaluation of the Syndication and Financial Interest Rules, Memorandum Opinion and Order, 7 FCC Rcd 345 (1991).
[3] 982 F.2d 1043 (7th Cir. 1992).
[4] Id. at 1046.
[5] Id. at 1054.
[6] <u>United States v. Nat'l Broadcasting Co.</u>, 842 F. Supp. 402 (C.D. Cal. 1993).
[7] Id. at 405-06.

about the changes in the television industry since 1980 it can hardly be said that 34 percent – or an average slightly more than 11 percent for each of NBC, ABC, or CBS amounts to controlling marketplace power that caused the consent judgments."[8]

- In 1993, responding to the Schurz decision, the FCC repealed the rules, noting that there were then four broadcast networks and 100 cable networks, and that the three networks' prime-time shares had decreased from 93 percent in 1975 to 59 percent in 1992.[9]
- The networks have LOST EVEN MORE market power since 1993. Today there are seven English language broadcast networks and more than 300 cable networks. And, in 2001, the cable networks' collective prime-time ratings surpassed those of the four broadcast networks.
- To re-impose the fin syn restrictions, the Commission must be able to demonstrate that the market conditions that justified the rules in the first place still exist. This cannot be done. The rules could not be justified in 1993, and they surely cannot be justified today.

There is no competitive basis for re-imposing the financial interest and syndication rules.

- Because of all the new networks, program costs have gone up and the size of the average audience attracted by programs have gone down. Therefore, the "cost-per-viewer-delivered" for the networks has skyrocketed. Kagan estimates that, between the 1994-95 season and the 1998-99 season, the license fees paid by networks for each rating point skyrocketed from just over $45,000 to nearly $100,000.
- To deal with these challenging economics, ABC has sought (1) to increase the term of its licenses (ABC pays a premium for the longer license term); and (2) to get the right to repurpose (repeat), each episode in an effort to aggregate a larger total audience.
- In the 2001-02 and 2002-03 television seasons, because of these difficult business negotiations and because ABC was not then perceived as the most desirable network on which to place a show, Disney/ABC produced a high percentage of its own shows. However, with the term and repurposing issues now resolved and with a renewed sense of momentum at ABC, more producers are bringing their shows to ABC and ABC's schedule reflects an increasing number of non-Disney/ABC shows.

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[8] Id. at 404.

[9] Evaluation of the Syndication and Financial Interest Rules, Second Report and Order, 8 FCC Rcd 3282 (1993).

- Even in the current 2002-03 season, the following independently-produced comedy and drama shows, in which ABC has no financial interest or right, have been on the ABC prime-time schedule:
  - Dragnet;
  - NYPD Blue;
  - The Practice;
  - George Lopez;
  - Drew Carey;
  - Whose Line Is It Anyway?;
  - The Mole;
  - Dinotopia; and
  - Profiles from the Front Line.
- For the 2003-04 season, ABC ordered comedy and drama pilots from the following outside producers:
  - Warner Bros.;
  - Universal Television;
  - Tollin-Robbins/Warner Bros.;
  - Brad Grey TV/20th Century Fox;
  - Imagine TV/20th Century Fox; and
  - Carsey-Werner-Mandabach.
- Those arguing for re-imposition of the fin syn rules focus only on comedy and drama programming, and they ignore the role of independent producers in reality programming and made-for-television movies. In the 2002-03 season alone, ABC aired made-for-television movies from the following non-Disney producers: Universal, Hallmark, Fox Television, Paramount Pictures, and Handmade Films.
- Successful independent producers are doing very well in today's marketplace, particularly as compared to the extremely challenging economics of the broadcast networks. A few examples:
  - Oct. 27, 1999 Variety – David Kelly signs a production deal with 20th Century Fox worth an estimated $50 Million PLUS "backend guarantees built in that are potentially worth hundreds of millions of dollars".
  - Feb. 6, 2003 Variety – John Wells Prods. Signs a production deal with Warner Bros. Worth an estimated $70 Million. This deal was fueled by the $13 million per episode network license renewal for "ER" and the $7 million per episode network license renewal for "The West Wing".
- Producers have many networks to which they may seek to license their programs. Examples include: HBO, Showtime, Comedy Central, USA, TNT, Lifetime, TNN, The Sci-Fi Channel, A&E, Hallmark, or even to first-run television syndicators such as King World, Tribune, Sony, or Warner Bros.

Given the changes in the competitive landscape since the early 1970s, there simply is no conceivable legal or competitive basis for re-imposition of the fin syn rules. Any such effort would be ill-conceived and would be soundly rejected by the courts.